STATE OF MICHIGAN

IN THE SUPREME COURT

on de novo review of
the Judicial Tenure Commission

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
53rd District Court
Brighton, MI 48116,

Respondent.
_____/

S Ct Docket No. 157930
JTC Formal Complaint No. 99

RESPONDENT'S OBJECTION TO TENURE COMMISSION'S BILL OF COSTS

Dennis C. Kolenda, Esq. (P16129)
Attorney for Respondent
DICKINSON WRIGHT PLLC
Suite 1000
200 Ottawa Avenue, NW
Grand Rapids, MI 49503-2427
(616) 336-1034
DKolenda@dickinsonwright.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Other Authorities

Rules

In the opinion it issued in this case on June 28, 2019, this Court, citing to MCR 9.205(B), ordered the Judicial Tenure Commission to submit an itemized bill of costs. On July 23, 2019, the Commission filed a "memorandum regarding costs" with an attached affidavit, asking for $35,501.68. Accepting, which she does, those filings as a bill of costs, albeit mislabeled and defective, this is the objection to it permitted Judge Brennan by MCR 7.319(A) and MCR 7.219(C). For the reasons detailed below, the Commission may be entitled to a portion of $1,128.93, or, maybe, a portion of $6,582.63, but not yet and not more.

A. Applicable Law

MCR 9.205(B), soon to be numbered MCR 9.202(B), authorizes ordering a disciplined judge "to pay the costs, fees, and expenses incurred by the [C]ommission in prosecuting the complaint [against him or her] [but] only if the judge engaged in . . . fraud, deceit, or intentional misrepresentation, or . . . made misleading statements" during the Commission's investigation and prosecution of the judge. While MCR 9.201, which defines several terms in MCR 9.200, *et seq.*, does not define "costs, fees and expenses," those terms have readily-ascertainable meanings, nonetheless. The principles of statutory construction also apply to court rules, *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006), and some of those principles illuminate the meaning of MCR 9.205(B).

To start, if a statute or court rule uses words or phrases which have already received an authoritative construction by a jurisdiction's court of last resort, or a uniform authoritative construction by inferior courts, those words or phrases are to be understood according to that construction. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012 ed), p 322. See also *Nation v WDE Electric Co*, 454 Mich 489, 494 fn 8; 563 NW2d 233 (1997). That principle applies to both re-enacted statutes and rules using previously-interpreted terms, *Jeruzal v Wayne*

County Drain Commissioner, 350 Mich 527, 534; 87 NW2d 122 (1957), and also to new and different, related statutes or rules which use such terms. *Scalia*, *supra*; and *In re Chamberlain's Estate*, 298 Mich 278, 285; 399 NW 82 (1941).

A related principle is the presumption that a word or phrase used in multiple places in a text bears the same meaning throughout the text, while a material variation in different portions denotes a deliberate variation in meaning. *Scalia*, *supra; and Farrington v Total Petroleum*, 442 Mich 201, 210; 501 NW2d 76 (1993). The presumption applies not only to the same portions of a statute or court rule, but also to different, even distant portions of a comprehensive statute or a compilation of rules. *Scalia*, at 170-172. The singular is being used because there is just a single presumption with two impacts.

Another pertinent principle of construction is that words must be given the meaning they had when the text where they appear was adopted. *Scalia*, at 178. That principle is not as rigid as its detractors, in an effort to undermine it, often contend. Their contention ignores the significant difference between constitutions and more transient statutes and rules. *Id.*, at 189. But, fortunately, the nuances of so-called originalism need not now be plumbed. There is no hint that the meanings of MCR 9.205(B)'s undefined terms changed in any way after the subrule's enactment. Finally, since it is obviously aware of the principles of construction, *Jeruzal*, 350 Mich at 534, this Court must have anticipated their application to MCR 9.205(B), compelling the conclusion that their impact was intentional, *Bahr v. Bahr*, 60 Mich App 354, 359; 230 NW2d 430 (1975), not just analytically deduced.

Another principle, although not one of interpretation, also informs understanding the statutes and court rules pertaining to the taxing of costs. Because the power to tax them "did not exist at common law," *Jeffrey v Hursh*, 58 Mich 246, 258; 27 NW 7 (1885), and "is not an inherent

power," *Sucoe v Oakwood Hospital Corp*, 185 Mich App 484, 495; 462 NW2d 780 (1980), costs are recoverable "only . . . when there is statutory authority awarding them." *Hester v Detroit Parks Com'rs*, 84 Mich 450; 47 NW 1097 (1891). That said, this Court still has a say in taxing costs. The Legislature has chosen to share its authority. Specifically, the Revised Judicature Act (RJA) authorizes taxing or awarding "[m]atters specially made taxable . . . in the [court] rules," as well as by statute, MCL 600 [hereinafter RJA] 2405(2). Necessarily, therefore, costs are taxable when so provided by statute *or* court rule, *Sucoe*, 185 Mich App at 495, including by necessary corollary. *People v Kimble*, 470 Mich 305, 311; 684 NW2d 669 (2004).

B. Applicable Law Applied

The above-discussed principles not only lead to, but compel, the following conclusions about what the Commission seeks to recoup in this case:

1. The Commission asks first for reimbursement of $15,400 "in ***Master's services***," presumably, what Judge Giovan was paid in this matter. There are multiple reasons those services are not taxable. Not only does no statute, nor does MCR 9.205(B), authorize, expressly or by inference, taxing the compensation of a master, RJA 2405(1) actually disallows doing so. That subsection allows taxing "[a]ny of the fees of . . . persons mentioned in" either RJA 2401, *et seq.*, or RJA 2501, *et seq.* Masters are not mentioned there. Therefore, masters' fees may not be taxed, *Kimble*, 470 Mich at 311, and would not be taxable even if MCR 9.205(B) included them. Because the authority to tax costs is purely statutory, this Court cannot authorize costs the Legislature has chosen to disallow.

Furthermore, MCR 9.205(B)'s silence about masters' compensation is jurisprudentially deafening, so to speak. In MCR 9.128(B)(2), adopted long before the addition to MCR 9.205(B) of "costs, fees, and expenses," so the former explains the latter, this Court expressly requires

charging disciplined attorneys "the expenses of a[ny] master" assigned to a case per MCR 9.117. Such express inclusion in one rule, especially a nearby rule dealing with a comparable subject, but not in another, bespeaks a deliberate exclusion from the latter. *Farrington*, 442 Mich at 210. For confirmation, see also MCR 3.602(M), identifying an arbitrator's compensation as "a taxable cost." In other words, because this Court has twice at least made taxable hearing officers' compensation when it wished to do so, MCR 9.205(B)'s silence about a master's compensation expresses a contrary intention.[1]

Finally, if this Court reads the RJA and MCR 9.205(B) to allow taxation of what was paid to Judge Giovan, the Court needs more detailed information to review the request for reimbursement of the Master's compensation. Per the formula dictated by RJA 226(c)(ii), his compensation was limited to approximately $290 per day. At that rate, $15,400 represents 53 days of attention to this case. The formal hearing took nine days, and one afternoon was devoted to pretrial motions. Judge Brennan doubts that Judge Giovan claims to have devoted 43 more days to reading the record and the parties' briefs and to drafting his report.

2. Judge Brennan does not dispute that the Commission is entitled to ***"[w]itness fees, mileage and travel.***" See RJA 2552(4), which requires paying witnesses a per diem plus per-mile reimbursement of "travelling expenses," and RJA 2552(5), which allows taxing those expenditures. However, MCR 7.319(A) adopts "[t]he procedure for taxation of costs in the

[1] The Commission's acknowledgment that the Master's compensation was paid by it is troubling, to put it mildly. The Master was, it follows, for all practical purposes on the payroll of the prevailing party. That is no different than magistrates who issue search warrants and preside over preliminary examinations being on the staff of the presenting prosecutor's office. That would be intolerable. It is all the more unacceptable in judicial discipline proceedings. A master submitting an invoice to the Commission, let alone the Commission cutting the master a check, castrated, to put it bluntly, the first level of so-called independence which supposedly preserves the constitutionality of Michigan's unified judicial discipline system, *In re Chrzanowski*, 465 Mich 468, 487 fn 17; 636 NW2d 758 (2001), and badly comprises the other two; masters make the record on which the Commission and this Court rely to make their determinations. Now is too late for Judge Brennan to seek rehearing, MCR 9.226, even though she and her counsel did not learn of the Commission's relationship with the Master until just recently, but nothing precludes this Court from acting sua sponte.

Supreme Court . . . as provided in MCR 7.219; "subsection (H) of the latter rule adopts MCR 625's procedures for taxing costs; and among those procedures, is a requirement that, "[i]f witness fees are claimed [as taxable costs], an affidavit . . . *must state* the distance travelled and the days actually attended." MCR 2.625(G)(3) [emphasis added]. The Commission submitted an affidavit, but that affidavit says nothing about the distances traveled by the witnesses to the public hearing by the witnesses and the days they attended. Therefore, the Commission's claim for "[w]itness fees, mileage and travel expenses" is not ripe for an award of the requested reimbursement.

3. Judge Brennan also agrees that the Commission may tax certain ***transcript fees***, but she disagrees with the amount it requests of $16,833.50. The appropriate amount is no more than $5,453.70. *See* RJA 2543, which permits taxing the cost of transcripts at $1.75 per original page and 30 cents per page for each copy. (Higher rates are authorized for appeals of cases in differentiated case management programs, which, obviously, judicial discipline proceedings are not.) This case involved one original (for the file) and three copies (one for the Master and one for each party) for a combined allowed total of $2.65 taxable per page for transcripts. This case's transcripts total 2,058 pages: 1,927 pages of public hearing, 47 pages of a motion hearing, and 74 pages of MCR 9.216 argument before the Commission. The maximum possible taxable amount is, therefore, $5,453.70 at most.

Judge Brennan has used the phrases "no more than" and "at most" because RJA 2453(2) permits taxing transcript fees "[o]nly if the transcript is desired for the purpose of moving for a new trial or preparing a record for appeal . . ." Plainly, the transcripts in this matter were not prepared for seeking a new trial. Nor were they prepared "for appeal." The transcripts, save the one of proceedings before the Commission, were prepared, first, for counsel to craft their written closing arguments, which was the Master's preference, and, then, for the Master to craft his report.

Those transcripts were later used before the Commission and here, but that is different, a difference made material by RJA 2543(2)'s use of "only." Other, even if additional, purposes are at odds with that statutory word.

Furthermore, the proceedings before the Commission and before this Court were not appeals. The Commission and this Court made findings of fact, which is not deciding an appeal. While "logic would indicate" that hearing transcripts of judicial discipline public hearings be taxed like trial court transcripts, this Court, it is axiomatic, "cannot rewrite [the] statute[]," especially since taxing costs "is wholly statutory." *Kuberski v Panfil*, 275 Mich 495, 497; 267 NW 730 (1936). That is the exclusive province of the Legislature. *Muskegon v Slater*, 379 Mich 466, 473; 162 NW2d 652 (1967). Therefore, RJA 2543(2) must be applied strictly, *Portelli v IR Constr Product Co, Inc*, 218 Mich App 591, 607; 554 NW2d 591 (1996); and *Elia v Hazen*, 242 Mich App 374, 382; 619 NW2d 1 (2002). So that the Commission may not recoup transcript fees, even no more than $5,453.70.

Without specifics from the Commission, Judge Brennan and this Court can only guess, which neither should have to do, about the genesis of the other $11,379.80. The burden was on the Commission. "Each item claimed in [a] bill of costs, except fees of officers for services rendered, *must be specified particularly*." MCR 2.625(G)(1) [emphasis added].[2] Perhaps, that is why this Court's opinion used the word "itemized" to describe the bill of costs to be filed. But for the sake of completeness, she will. If the Commission paid "fees" in addition to transcript costs, which its affidavit's use of "transcripts/court reporter fees" suggests, RJA 2543(2) permits taxing only a specified per-page amount. Judge Brennan does not begrudge in the least the court recorder (Ms. Jorgensen) collecting from the Commission whatever fees it contracted to pay for her

[2] Remember, MCR 2.625 governs taxing the Commission's costs.

availability and/or any premium it agreed to pay her for transcripts, but such extras cannot be passed along to Judge Brennan. If applicable, RJA 2543 allows taxing only $1.75 per original page and 30 cents per page for each copy.

One additional possible explanation for the extra $11,379.80 in "court reporter" expenses comes to mind. Perhaps, the extra amount reflects what the Commission paid for transcripts from Judge Brennan's divorce case, transcripts of proceedings before her, and transcripts of appeals to her then-Chief Judge of disqualification denials. If so, none of those transcripts, whether originals prepared for the Commission or copies obtained by it of previously-prepared transcripts, are taxable. RJA 2543 contemplates only transcripts of proceedings in the case in which taxation is sought, i.e., only proceedings in this case, not proceedings in other cases transcribed for use in this case. Furthermore, as noted earlier, to be taxable, transcripts must have been prepared "only . . . for the purpose of moving for a new trial or . . . for appeal." Transcripts of proceedings in other cases were not remotely as required by RJA 2543(2). Those transcripts were obtained as part of the Commission's investigation, to satisfy MCR 9.208(C)(a)(ii), and/or as evidence for presentation at the public hearing.

4. That leaves the Commission's requests for $1,114.25 for the ***costs of "electronic conversion"*** of transcripts and exhibits and $975 for "***converting cell phone billing records to electronic format***." "Conversion" and "converting" are digital-speak for copying. Only the cost of certified copies are taxable. RJA 2549. It is, and has long been, our law that general copying costs are not taxable. See, e.g., *Caswell v Stearns*, 259 Mich 445, 446; 243 NW 255 (1932); *Guerrero v Smith*, 280 Mich App 647, 673-674; 461 NW2d 723 (2008); *LaVene v Winnebago Industries*, 266 Mich App 470, 480; 702 NW2d 652 (2005); and *Beach v State Farm Mut Auto Ins*

Co, 216 Mich App 612, 622-623; 550 NW2d 580 (1996). Therefore, the requested conversion costs totaling $2,089.25 must be disallowed.

C. Addendum

The Commission's memorandum does not argue in support of the taxability of the specific costs it seeks, most of which, as just demonstrated, are not taxable. That memorandum argues, instead, that this Court should, "as guidance in future cases," declare that, once the Court determines that a respondent "was dishonest" and "decides in its discretion that costs should be awarded," the costs "associated with prosecuting the *entire* case" [emphasis in original], not just the costs related "to the scope of the deceit," must be awarded. The Commission uses the words "should [then] be awarded," but in context that is a contention that all authorized costs must always be awarded once a decision is made to award any.

The Commission advances two reasons for its conclusion. But, both are significantly wanting. First, contends the Commission, "nothing in its [MCR 9.205(5)'s] language suggests that if a judge engages in deceit, the judge may be assessed the costs that are attributable only to the deceit or prosecuting the deceit" (p 2). The subrule may not say that, but neither does it say that this Court cannot limit the costs it assesses to those attributable to the "fraud, deceit . . .," etc., it finds. To the contrary, what else the subrule says at least allows such prorating. Judge Brennan contends that context, historical and textual, requires apportionment.

"Perhaps, no interpretative fault is more common than the failure . . . to consider the entire text," to not recognize that "[c]ontext is a primary determinant of meaning." *Scalia*, at p. 167. MCR 9.205(B) says not only "incurred . . . in prosecuting the complaint," but also and immediately preceding those words that a judge "may be ordered to pay th[ose] costs, fees and expenses." Using "may" is a quintessential grant of discretion and is not textually limited to only deciding

whether to assess costs at all, but which also applies to deciding how much in costs to assess. Discretion to do something is discretion to go all the way, so to speak, or to go only part way: to tax all or none of the case's costs, or to tax some. Since that has been our law since well before 2005, it is what MCR 9.205(B)'s 2005 amendment means.

The Commission also contends that MCR 9.205(B)'s costs are not any kind of sanction (p 2). If true, that gets us nowhere. But it is not true. The subrule's discretion to order costs, etc., is "[i]n addition to any other sanction . . ." That means, it contextually follows, that those costs are also a sanction, are "[an]other sanction." Inherent, therefore, in the contention that costs are not apportionable when not a sanction is a recognition that they are apportionable when they are a sanction, which they are. Not only does Judge Brennan accept, obviously, that acknowledgment, she notes its inherent logic. To paraphrase a colloquialism borne of the law, a sanction must fit the misconduct. In other words, as a sanction, MCR 9.205(B)'s costs cannot go beyond the fraud, deceit, etc., which prompted their assessment.

A third reason to reject the Commission's reading of MCR 9.205(B)'s amendment is the fact that, multiple times, this Court, including justices who had voted for that amendment, did not read it as proposes the Commission. Justice Corrigan, for instance, saw the amendment as "protect[ing] governmental resources, especially when a JTC investigation requires the expenditure of additional resources *because of* the judge's acts of misrepresentation" 474 Mich ccxlaiii [emphasis added]. Her colleagues did not disagree. Two dissented from amending the rule, but neither took issue with Justice Corrigan's reading of the reason for the amendment. Then, in the case of *In re Justin*, 490 Mich 394, 425; 809 NW2d 126 (2012), this Court, some of whom had voted to amend MCR 9.205(B), directed the Commission to submit a bill of costs "itemizing

what costs may be attributed to the conduct or statement . . . that permit the court to impose costs, [etc.]," and, then the Court assessed only that percentage (30%).

Finally, in the cases of *In re Nettles-Nickerson*, 481 Mich 321, 323; 750 NW2d 560 (2008), and *In re James*, 492 Mich 553, 570; 827 NW2d 144 (2012), the Court assessed only small fractions (10% and 20%, respectively) of the cases' total taxable costs. The Commission is correct that in those cases this Court did not explain how it arrived at those apportionments (p 4). So what. What is dispositive is that the Court awarded far less than the "expenses incurred . . . prosecuting the [cases'] complaint[s]," which means that either the Court understood MCR 9.205(B) to not require it to tax "the costs associated with prosecuting the entire case . . .," or that it blatantly ignored the very rule it had adopted.

Hence, we come to determining what portion of this case's "costs, fees, and expenses" to assess against Judge Brennan, if the Court determines that it can and should assess just a portion. The Commission asks for 80%, which it contends "is probably fair," although an "inherently and highly arbitrary" figure (p 8). Because no court is to act arbitrarily, the Commission's acknowledgement should mean that it has failed to sustain its burden, entitling it to no costs. But, rather than end with that observation, Judge Brennan will explain, using the Commission's own words to start, why far less than 80% is appropriate. "There is no way to measure" its first contention that, absent Judge Brennan's deceit, this case might have been settled with no costs, etc. (p 5). The Commission would never have agreed to anything less than Judge Brennan leaving the bench. The Commission also acknowledges that all the witnesses "would have to [have] be[en] called even if deceit were not an issue." (p 5). While most, but not all, of the witnesses had something to say pertinent to the claims of deceit, none were single-purpose witnesses, which is usual (p 5), so witness fees were not affected.

Three formal complaints were filed in this case. The Second Amended Complaint contains 17 counts, although its Counts III and VI, which had earlier been dropped, contain no allegations, leaving 15 counts to be pursued. While the Commission asserts here that deceit was not a factor in only Counts VII, IX, X, and XV (p 8), the Commission identifies only Counts I, II, IV, V, XI, XII, and XVI as implicating deceit, in other words, less than half the case. How, then, was 80% of the case "probably" about deceit? And, a review of the Commission's brief of May 30, 2019, to this Court reveals that the Commission cited to only 20 of the multitude of exhibits (far less than 80%) to support its claims of deceit. Also, the Commission's brief cited to only 193 pages (10%), and often just a few lines per page, of the trial transcript to support its claims of deceit. How, then, was transcript preparation "[a]nother main driver" (p 6) of the cost of the case? Finally, the Master merely accepted the Examiners' Appendix 2. He did not need to parse the record or draft detailed findings. That was not improper, but relying on his effort regarding deceit as "[a] main driver" of the cost of prosecuting this case is an exaggeration. It is, therefore, not merely speculative, but unprincipled, to content that 80% of the costs of this case were necessitated by Judge Brennan's supposed deceit. More like 10-20% seems generous.

D. Conclusion

If this Court is inclined to rule that MCR 9.205(B) requires awarding the Commission all the costs of prosecution, nothing should be done without full briefing and oral argument. Such a ruling would represent a major change. Even if the Court is inclined to award 80% of those costs, a full submission is required. Seven days is hardly enough time for Judge Brennan's counsel to have parsed and explained the huge record to better explain why such a high percentage is not supported. If, on the other hand, only 10-20% is awarded, then, the Commission is entitled to no

more than $117.89 (10-20%) in witness fees and mileage, or, in the alternative, to no more than $663.26 - $1,326.53 ($1,178.93 plus $5,453.70) for transcripts.

Respectfully submitted,

By:*/s/ Dennis C. Kolenda*
Dennis C. Kolenda, Esq. (P16129)

DICKINSON WRIGHT PLLC
Attorneys for Hon. Theresa M. Brennan

Suite 1000
200 Ottawa Avenue NW
Grand Rapids, MI 49503
(616) 458-1300
dkolenda@dickinsonwright.com

GRAPIDS 40753-2 569360v5